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90624—36

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 331

UNITED STATES OF AMERICA, PETITIONER

v.

A. B. LEACH & CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit, entered in the above cause on June 30, 1936, affirming the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division.

OPINIONS BELOW

The memorandum opinion of the District Court (R. 8) and the opinion of the Circuit Court of Appeals (R. 24) are not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 30, 1936 (R. 26). The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondent subscribed for shares in several corporations, which were then issued in the name of an employe of respondent, appointed to receive and hold the shares for the benefit of respondent and for its convenience in connection with future sales of said shares to the public. Did this transaction involve a transfer by respondent to its nominee of the right to receive shares of stock, within the stamp tax provisions of the Revenue Act of 1926.

STATUTE AND REGULATIONS INVOLVED

These will be found in the Appendix, *infra*, pp. 6–8.

STATEMENT

The facts, as set forth in the taxpayer's declaration (R. 2–7), may be summarized as follows:

Respondent is a corporation organized under the laws of New York and during the period in question was engaged in the sale of securities to the public (R. 2–3). Prior to August and September 1931, respondent organized five corporations and subscribed to the original issue of stock thereof, aggregating 826,320 shares (R. 3–5). Immediately upon the organization of said corporations the stock so subscribed for was issued in the name of

one Vercouter, an employe of respondent, appointed to receive and hold the capital stock of said corporations for the sole benefit of respondent and for its convenience in connection with future sales and transfers of said stock to the public (R. 5–6).

In August and September 1931, the Commissioner assessed stamp taxes on respondent under Schedule A (3), Section 800, Title VIII, of the Revenue Act of 1926, in the aggregate amount of $16,526.40, in respect of the foregoing transactions declared by the Commissioner to be transfers by respondent to Vercouter of the right to receive shares of stock. The amount assessed was paid under protest, and on October 8, 1932, respondent filed claim for refund which was denied on March 18, 1933 (R. 6).

This suit was brought on September 11, 1933, to recover the above amount, $16,526.40, with interest. The United States demurred to the petition. The District Court rendered judgment for the taxpayer (R. 9) which was affirmed by the Circuit Court of Appeals.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In failing to hold that the transactions involved constituted transfers by respondent to its nominee of the right to receive shares of stock within the stamp tax provisions of the Revenue Act of 1926.

2. In holding that the transactions involved were not subject to the stamp tax provisions of the Revenue Act of 1926.

3. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. Like the decision of the Court of Claims in *United States* v. *Automatic Washer Co.*, No. 330, present Term, in which the Government has petitioned for certiorari, the decision below is in conflict with that of the Circuit Court of Appeals for the Second Circuit in *Founders General Corporation* v. *Hoey*, decided July 6, 1936, not officially reported, but found in 1936 Prentice-Hall, Vol. 1, par. 1378. The facts in the *Founders General* case closely parallel those in the present case. In each the taxpayer corporation subscribed for shares of stock and designated a nominee in whose name the shares were to be issued. In neither case did the nominee have a beneficial interest in the shares.[1] The court below, in holding the transaction not subject to the stamp tax, relied upon the reasoning and authority of *Union Trust Co.* v. *Heiner*, 26 F.

[1] In the *Founders General* case the nominee was designated prior to the payment by the corporation of the subscription price of the stock; this fact did not affect the conclusion that the corporation transferred to its nominee the right to receive the shares. In the present case it does not clearly appear whether the nominee was designated prior or subsequent to the payment by the corporation of the subscription price for the several blocks of shares (R. 5–6).

(2d) 391 (W. D. Pa.), and the decisions of other District Courts which followed it. As is pointed out in the Government's petition in the *Automatic Washer* case, No. 330, *supra,* the Circuit Court of Appeals for the Second Circuit in the *Founders General* case expressly disapproved and declined to follow the *Union Trust Co.* decision.

The reasons advanced in the petition for certiorari in the *Automatic Washer* case, No. 330, *supra,* are applicable to the present case. They will not be repeated here, but reference thereto is respectfully made.

Because of the importance of the question and the conflict of decisions existing in the lower courts, the application of the stamp tax provisions to transfers involving nominees without beneficial interest should be authoritatively settled by this Court.

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

SEPTEMBER 1936.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

TITLE VIII.—STAMP TAXES

SEC. 800.—On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, * * * the several taxes specified in such schedule. * * * (U. S. C., Title 26, Secs. 900, 908.)

* * * * * *

SCHEDULE A.—STAMP TAXES

* * * * *

2. *Capital stock, issue.*—On each original issue, whether on organization or reorganization, of certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, on each $100 of face value or fraction thereof, 5 cents: *Provided,* That where a certificate is issued without face value, the tax shall be 5 cents per share, unless the actual value is in excess of $100 per share, in which case the tax shall be 5 cents on each $100 of actual value or fraction thereof, or unless the actual value is less than $100 per share, in which case the tax shall be 1 cent on each $20 of actual value or fraction thereof.

The stamps representing the tax imposed by this subdivision shall be attached to the stock books and not to the certificates issued.

3. *Capital stock, sales or transfers.*—On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: * * *

Treasury Regulations 71, approved July 7, 1928, promulgated under the Revenue Act of 1926:

ART. 31. *Basis of tax.*—Every transfer or sale of stock, either before or after issuance of a certificate, is taxable. The tax accrues at time of making the sale or agreement to sell or memorandum of sale, or delivery of, or transfer of the legal title to shares, or certificates of stock, or of profits, or of interest in property or accumulations in any corporation, joint-stock company, or association, or of the right to subscribe for or to receive such shares or certificates, regardless of the time or manner of the delivery of the certificate or agreement or memorandum of sale.

ART. 34. *Sales and transfers subject to tax.*—The following transactions are subject to the tax:

(a) The sale, or transfer, or change of ownership, of certificates of stock, or of profits, or of interest in property or accumulations in corporations, joint-stock companies, or associations.

(b) The sale or transfer of shares of stock, whether or not represented by certificates.

(c) The transfer of stock to or by trustees.

* * * * *

(g) The transfer of the interest of a subscriber for stock, however such interest may be evidenced or conditioned upon further payments.

(h) The transfer of the right to subscribe for stock in any corporation, joint-stock company, or association, whether or not evidenced by warrants.

* * * * *

(t) The transfer of the right to receive stock which a corporation has unconditionally agreed to issue.

(u) Transfers of stock are subject to the tax even though the holders thereof are not entitled in any manner to the benefit of the stock.

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